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# Why Apologize for the U-2?

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Because International Law and Usage Required It, Says Professor

By Harold J. Berman

(Excerpts from the introduction to "Trial of the U-2," translation of the Francis Gary Powers trial, published by Translation World Publishers, Chicago. Mr. Berman is professor of law at Harvard University.)

We cannot understand the significance of the Powers trial unless we realize what lay behind Mr. Khrushchev's demand for a pledge that the United States would not undertake U-2 flights in the future, a statement "de-

ploring" the violation of Soviet territory, in the past, and a declaration that the person directly responsible would be punished.

*The Mirror of Public Opinion*

What Mr. Khrushchev wanted was

an apology—a statement of regret, a pledge of discontinuance, and a promise to call to account those responsible. The almost universal American reaction to this demand was that it was absurd. The President of the United States, it was said, could obviously never submit to such a self-abasement. Mr. Khrushchev must know that. Therefore the demand could not be serious. Mr. Khrushchev, as a "realist," could not let the summit meeting stand or fall on a mere ceremony.

The American reaction was based in part on ignorance of international law and international customs, and in part on ignorance of, or indifference to, Soviet internal politics.

In the first place, it was said by many that espionage is not considered to be a violation of international law, since it is practiced by virtually all states; but it was not added that this is so only because the state which commissions the spy "cannot officially confess" to having done so. The admission of espionage removes the veil of international legality. (There is no question that espionage is illegal under the domestic laws of all countries; the only question is as to the responsibility of one state under international law for violating the espionage laws of another.)

## The Custom of Apology

In the second place, many failed to recognize that an intrusion into Soviet airspace at a flight of 12 miles is clearly a violation of international law, regardless of what may ultimately be decided concerning outer space.

But the chief error in the general American reaction was the failure to recognize that it is entirely customary in international relations, and is indeed a principle of international law, that a state which commits a violation of



— Herblock in *The Washington Post*.

"What's So Funny?"

ever there is an international delinquency, "at least a formal apology on the part of the delinquent will in every case be necessary."

The very reason which made it seem impossible for the State Department to issue a formal statement of apology to the Soviet Government—namely, loss of "face"—made it seem necessary to Mr. Khrushchev to obtain such an apology, for without an apology the flight must be justified, and any justification is a public humiliation of the Soviet Government.

At first blush all this seems extremely childish. Why should international law require an apology when everyone understands that the government required to make the apology is not sorry? Or why should a government feel insulted when another government merely states what it honestly thinks? Or, to put the question in still more crucial terms, why should a government resent a charge made by another government when everyone knows that the charge is true?

The answer is: the charge itself, the insult, the refusal to apologize, is a denial of the equal rights of the other government; it establishes a double standard; it denies the universal application of the principle. A tongue-in-cheek apology pays lip-service to the principle—in this case the principle of territorial sovereignty; a refusal to apologize adds insult to injury, and declares that we recognize the principle of territorial sovereignty in the case of some countries but not in the case of the Soviet Union.

The requirement of an apology in

International law has no analogy in our domestic law. But in domestic

law it is easy enough for the aggrieved party to get satisfaction through a lawsuit. If my enemy trespasses on my property I can go to court and get damages—possibly even punitive damages—and an injunction. If a hostile plane intrudes over a country's territory and is shot down, however, there is no easily available judicial remedy against the offending government. Suit can be brought in the International Court of Justice, but many countries (including both the United States and the Soviet Union), do not accept the compulsory jurisdiction of that court in all cases. Moreover, diplomacy requires a more speedy response.

An apology was especially necessary for Mr. Khrushchev in view of what he stands for in Soviet politics. Our government's statements challenged not only his foreign policy, but also his domestic policy. It also challenged his personal position of leadership in the Soviet Union and the Communist world. Undoubtedly there are many Russians, as well as many Chinese, Czechs and others, who consider Mr. Khrushchev's foreign policy to be based on wishful thinking. In the Communist world, as in the West, negotiation seems to many to smack of softness. The very fact that an American U-2 plane was flying over Soviet territory discredited Mr. Khrushchev in the eyes of such people.

## Undermining Mr. Khrushchev

An apology from the United States Government was needed to restore his prestige, to provide a symbol of the success of his diplomacy. The refusal to apologize, coupled with the public characterization of the Soviet Union as in effect an outlaw, to whom the ordinary rules of international law do not apply, was bound to undermine his position at home—unless he was able to return blow for blow.

Thus it was not the U-2 flight itself but rather the failure of the United States Government to make the proper accepted ceremonial expressions of regret which caused Mr. Khrushchev to refuse to participate in the summit conference, to withdraw his invitation to Mr. Eisenhower to visit the USSR, and thereafter to denounce the President in a series of press conferences and speeches. Eventually, the expressions of regret and repentance which Mr. Khrushchev could not wring out of the United States Government were wrung by the Military Division of the Supreme Court of the USSR out of Francis Gary Powers.